

MDM Declaration Exhibit A-07

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SUSANNA MIRKIN, * Case No. 18-CV-02949 (ARR)
individually and on behalf *
of others similarly *
situated, *
 *
Plaintiffs, * Brooklyn, New York
 * August 27, 2020
v. *
 *
XOOM ENERGY, LLC, et al, *
 *
Defendants. *
 *
* * * * *

TRANSCRIPT OF CIVIL CAUSE FOR VIDEO MOTION HEARING
BEFORE THE HONORABLE RAMON E. REYES, JR.
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: STEVEN L. WITTELS, ESQ.
J. BURKETT MCINTURFF, III, ESQ.
STEVEN D. COHEN, ESQ.
Wittels McInturff Palikovic
18 Half Mile Road
Armonk, NY 10504

For the Defendants: DANIEL J. BROWN, ESQ.
CHRISTOPHER A. ROJAO, ESQ.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

Fiore Reporting and Transcription Service, Inc.
4 Research Drive, Suite 402
Shelton, Connecticut 06484 (203)929-9992

1 (Proceedings commenced at 11:31 a.m.)

2 THE COURT: Good morning. This is Magistrate Judge
3 Reyes. We are holding a video argument in Mirkin vs. Xoom,
4 docket no. 18-CV-2949.

5 Let's start with appearances for the plaintiff. And
6 I'll ask you to do it in order of seniority, if you will.

7 MR. WITTELS: Thank you, Your Honor. Steven Wittels
8 from Wittels, McInturff, Palikovic for the plaintiffs and the
9 proposed class. Good morning.

10 THE COURT: Good morning.

11 All right. You're muted.

12 MR. MCINTURFF: How about now?

13 THE COURT: Yes.

14 MR. MCINTURFF: Okay. Good morning, Your Honor.
15 Burkett McInturff from Wittels, McInturff and Palikovic on
16 behalf of plaintiffs in the proposed class.

17 MR. COHEN: Good morning, Your Honor. This is
18 Steven Cohen on behalf of plaintiffs in the proposed class
19 from Wittels, McInturff, Palikovic as well.

20 THE COURT: Counsel for the defendant.

21 MR. BROWN: Yes. Thank you, Your Honor. Daniel
22 Brown from McCarter & English on behalf of the XOOM
23 defendants.

24 MR. ROJAO: And Good morning, Your Honor. It's good
25 to see you virtually. Christopher Rojao from McCarter &

1 English on behalf of defendants XOOM Energy, LLC and XOOM
2 Energy New York, LLC.

3 THE COURT: All right. So we have two motions to
4 discuss, one is a motion to compel brought by the plaintiffs,
5 and the other is also a motion for appointment of interim
6 class counsel that is also brought by the plaintiffs.

7 So whoever wants to speak for the plaintiffs on both
8 of those motions, I'll let you take the floor.

9 MR. WITTELS: Your Honor, Steven Wittels.

10 May I just ask preliminarily, we had sort of
11 discussed it with my team here and I was going to make the
12 argument on the interim class counsel and Steven Cohen,
13 perhaps with backup from Mr. McInturff, was going to speak to
14 the motion to compel. Is that acceptable?

15 THE COURT: That's fine. However you want to divvy
16 up the responsibilities. I would prefer that we deal with the
17 motion to compel first and then move into the interim class
18 counsel motion.

19 MR. COHEN: Okay, Your Honor. I can speak to that.
20 This is Steven Cohen.

21 With regard to -- I guess we'll start with the
22 natural gas first.

23 The defendants claim in their response that we don't
24 -- that plaintiffs aren't alleging claims regarding gas
25 customers and that's completely false. The complaint is

1 littered with references to gas and to energy generally. In
2 the class definition, in paragraph 66, there's reference to
3 gas customers. The breach of contract claim, paragraphs 79 to
4 80, both discuss gas and energy. So this notion that they're
5 presenting that our complaint is solely regarding electricity
6 customers just is not accurate. The first six paragraphs all
7 refer to gas and energy.

8 Second, the contract language for both gas customers
9 and electricity customers is identical. They produced Boris
10 Mirkin's gas contract, but they haven't produced his billing
11 data, so we don't have that to confirm what gas prices he was
12 charged.

13 Also, defendants never objected to any of our
14 discovery requests on grounds that we were seeking gas. So
15 the fact that they brought up this gas argument four or five
16 months after serving their discovery responses, that argument
17 is waived. They first raised this in late April. They served
18 the discovery responses the end of 2019.

19 Also, with regard to plaintiffs being electricity
20 customers, as we showed in footnote 2 of our letter, the
21 Second Circuit has made clear that a named plaintiff can sue
22 for a similar claim if the underlying harm is similar. And
23 like I said, the electricity and gas contracts are identical
24 here.

25 We also need, you know -- for class purposes, we

1 need gas discovery to determine whether plaintiffs can
2 represent gas customers.

3 Defendants in their letter make some point about
4 certain types of costs being different. Well, you know, okay,
5 then we need to show, you know, that there's commonality and
6 reciprocity for class purposes.

7 We also have -- from the Maryland litigation,
8 there's deposition testimony from XOOM's director of pricing
9 and structure that XOOM set electricity and gas rates using
10 the same process, so clearly, you know, clearly there's
11 similarities.

12 And finally in 2018, defendants filed something with
13 Judge Ross saying that they moved to strike our gas claims,
14 but they never did that any -- they never did that. So they
15 conceded that gas claims are part of our case and our
16 complaint.

17 THE COURT: Okay.

18 MR. COHEN: Do you want me to move to customer
19 complaints or shall we deal with gas first?

20 THE COURT: Let's deal with gas first.

21 So who wants to speak on that for the defendant?

22 MR. ROJAO: I will speak on that, Your Honor.

23 Christopher Rojao from McCarter & English.

24 To respond to some of -- well, first I'll make a
25 couple of statements.

1 It's well settled that plaintiffs are only entitled
2 to discovery related to claims that they've actually pled and
3 for which they have standing to pursue. In this case, neither
4 of those requirements are met with respect to natural gas
5 customers.

6 More specifically, as plaintiff acknowledged in their
7 letter, the amended complaint does not set forth specific
8 allegations regarding breach, breach of any natural gas
9 contract.

10 Indeed, the amended complaint alleges that
11 plaintiffs and their proposed class entered into a contract
12 with defendant XOOM for the provision of electricity. It
13 alleges that XOOM agreed to charge plaintiff a variable rate
14 based on its actual and estimated supply of cost for
15 electricity. That's paragraph 77, Your Honor.

16 It then alleges that plaintiffs in the proposed
17 class paid variable rates charged by XOOM for electricity and
18 that XOOM breached the electricity agreement because it did
19 not charge plaintiffs this manufactured market supply rate
20 that plaintiffs have calculated for purposes of this
21 litigation.

22 It does not allege anywhere that Boris or Susanna
23 were natural gas customers, that they paid anything to XOOM
24 for natural gas, or that XOOM breached any agreement to
25 provide natural gas service to plaintiffs or the proposed

1 class.

2 Further, plaintiffs admit that their market supply
3 rate that they calculated only applies to electricity costs.
4 It's written in bold lettering, Your Honor, on page 15 of the
5 amended complaint that says XOOM charges improperly high rates
6 for electricity. It doesn't say XOOM charged improperly high
7 rates for natural gas or that plaintiffs were natural gas
8 customers. So plaintiffs have not asserted any claim nor
9 offered any theory of liability pertaining to any breach of
10 any natural gas contract.

11 XOOM's not required to move to dismiss or strike
12 allegations or claims that haven't been pled yet. That can be
13 done at the motion for certification stage.

14 In addition --

15 THE COURT: So is it the defendants' contention that
16 gas is not implicated anywhere in the complaint?

17 MR. ROJAO: No. We understand that there's
18 references to gas in the complaint. However, there's no
19 reference to any breach of any natural gas contract. There's
20 no allegation, Your Honor. I'm sorry.

21 There are references to gas in the complaint.
22 That's clear. However, when you actually look at the
23 substantive allegations, it only alleges a claim for breach of
24 an electricity sales agreement.

25 And they don't allege that they were natural gas

1 customers. They don't allege anywhere that Boris or Susanna
2 actually signed up to receive natural gas or that they paid
3 anything to XOOM for natural gas. None of that's in the
4 complaint, Your Honor. And that's all required for standing.
5 And that's required to state a claim. And none of that's in
6 there. So there's no claim for natural gas and, therefore,
7 there shouldn't be any discovery pertaining to natural gas.

8 Regarding their argument that natural gas is the
9 same as electricity, that's just not the case, Your Honor.
10 Those are two entirely different commodities.

11 THE COURT: And so what would stop me from requiring
12 XOOM to produce Boris' -- apparently he had some gas contract
13 on another residential property with someone else, whoever
14 that is -- what would stop me from ordering XOOM to produce
15 that discovery related to his standing?

16 And then if, in fact, he was a gas customer and paid
17 money to XOOM for gas at an inflated rate permitting the
18 complaint to be amended and relate back to the original filing
19 because there is allegations -- perhaps general -- that gas is
20 involved -- paragraphs 1, 6, 66, others -- and then we have an
21 amended class complaint for gas and electric?

22 MR. ROJAO: Thank you, Your Honor. So I'll address
23 those points in turn.

24 In this litigation, it's unclear whether or not --
25 we already know that Boris has signed up in other people's

1 names to receive services, so we're not sure if there is
2 billing data relating to Boris, that Boris paid anything, or
3 if it's in somebody else's name. So if plaintiffs want to
4 provide that information to us as to -- if he signed up in his
5 own name or someone else's name and who paid, we'd be happy to
6 look for that.

7 Regarding amending the complaint, Your Honor, we
8 would submit that the plaintiffs would need leave to file an
9 amended complaint. And we would request a briefing on that
10 issue because we don't believe the plaintiffs were aware of
11 their claims previously at the time that they -- if they did
12 receive natural gas services, they would have been aware of
13 that. And they didn't allege that claim in this lawsuit.

14 So I think we would request briefing on whether or
15 not plaintiffs would be entitled to relation back based on the
16 allegations in the complaint, whether or not they're
17 fictitious entities, all of that we would request briefing on.
18 But we wouldn't submit that it would be appropriate at this
19 time to simply permit an amended pleading with relation back
20 without legal briefing on that, Your Honor.

21 THE COURT: Well, certainly XOOM had notice of the
22 gas claim, whether it's adequately pled or not. So I don't
23 know how they would be prejudiced were I to grant an amended
24 pleading and allow it to relate back to the original filing.
25 And all that does is just extend the statute of limitations

1 period, right? They could file tomorrow a new case on gas and
2 you would have a shorter statute of limitations period, right?

3 MR. ROJAO: Well, Your Honor, they would need a
4 plaintiff who was a natural gas customer. And they would need
5 a plaintiff who was a natural gas customer within the
6 limitations period tomorrow, and we submit that Boris would
7 not be that plaintiff.

8 THE COURT: Mr. Cohen, does Boris have a gas
9 contract with XOOM? Do you know?

10 MR. COHEN: We have the contract that defendants
11 produced and on there is the account number. So regarding
12 defense counsel's statement that they might not know how to
13 find it because it might be in someone else's name, they
14 should be able to pull it up based on the document they
15 produced that has the account number and the address. So I
16 don't see why that would be any difficulty on their end.

17 THE COURT: So it has an account number and address,
18 and it has two names or one name?

19 MR. COHEN: The documents that we received, the
20 enrollment and the contract, I believe just has Boris' name.
21 It has his email address. It has his phone number.

22 THE COURT: Same email address and phone number that
23 he used for the electric?

24 MR. COHEN: I believe it might be different, but I'd
25 have to double-check.

1 MR. ROJAO: They are different, Your Honor.

2 THE COURT: So let's say he used a different email
3 address and telephone number and it's at a different location,
4 what's the result of that?

5 MR. ROJAO: Well, we know here, Your Honor, that he
6 signed up for the services in somebody else's name. So is it
7 that somebody else is signing up in his name?

8 THE COURT: Why do you -- why do you know that he
9 signed up for the services in somebody else's name?

10 MR. ROJAO: He signed up in his wife's name. The
11 plaintiffs have stated that.

12 THE COURT: For which?

13 MR. ROJAO: For this case.

14 THE COURT: No. No. For the gas or the electric?

15 MR. ROJAO: The electric. The plaintiff signed up
16 in his wife's name. Boris signed up in his wife's name.
17 Sorry, Your Honor.

18 MR. MCINTURFF: Your Honor, this is Burkett
19 McInturff. May I be heard briefly on this issue?

20 THE COURT: Of course.

21 MR. MCINTURFF: So first of all, just some
22 background. When you sign up for energy, you're only able to
23 sign up for the energy of the name of the person that's on
24 your ConEd or National Grid account. So if my wife is on our
25 ConEd account and I decide that, you know -- obviously with

1 consultation of my wife -- but if I decide to switch our
2 energy to, you know, XOOM, I can sign up and XOOM will allow
3 me to sign up, but it will -- the account will still be in my
4 wife's name because that's the account that ConEd has.
5 Because the way it works is XOOM's billing goes through ConEd.
6 And so once someone in the house with authority signs up, it
7 just -- the account name is the same name as the name on
8 whatever ConEd or Nation Grid has. That's part one.

9 But point two, this is a bit of -- it's not
10 necessarily a tangent, but it's not the quickest and most
11 efficient way to resolve the issue.

12 In our opinion, the most efficient way to resolve
13 the issue is to look at the Second Circuit case law on class
14 standing. And essentially that case law has been developed in
15 the context of when a consumer or a shareholder purchases a
16 product and they seek to represent other consumers or
17 shareholders in class actions who purchased similar products
18 where the issues are the same.

19 The case that I always remember is a case against
20 *Jamba Juice*. And in *Jamba Juice*, the consumer purchased
21 banana-flavored Jamba Juice that was labeled as all natural.
22 And the consumer sued on behalf of the various Jamba Juice
23 flavors and said none of them are natural. They're all
24 labeled all natural, but none of them are natural. Some of
25 them have this chemical. Some of them have a different

1 chemical.

2 And the defendants took a similar position as the
3 defense is taking in this case, which is, well, no, you only
4 purchased banana so you can't sue for strawberry or for
5 pineapple flavors.

6 And the Court, consistent with the robust body of
7 case law under this doctrine of class standing, said, no,
8 that's fundamentally an issue to be worked out at the class
9 certification stage. Is this customer's claims -- where
10 unquestionably they have standing for the banana flavor, is
11 this customer's claims sufficiently similar under a Rule 23
12 analysis for that customer to represent the class?

13 And so the most efficient way to resolve this would
14 be let us have the gas discovery. We'll do the Rule 23
15 analysis.

16 We believe confidently, consistent with our other
17 practice in this area, is is that these -- the issues with
18 relation to whether or not XOOM breached its gas contracts are
19 sufficiently similar to the issues with respect whether or not
20 XOOM breached it's electric contracts that we think that under
21 a Rule 23 rubric our client can represent gas customers.

22 As my colleague said, the contracts are the same.
23 The product is slightly different, but the contract is the
24 same.

25 So, you know, we can go down this route of

1 determining whether or not Mr. and Mrs. Mirkin have specific
2 Article 3 standing for gas. Or we can follow the Second
3 Circuit and say, look, at this stage before discovery is over,
4 before we have moved for class certification, we're entitled
5 to see whether or not these products and issues are similar.

6 And just one final point. Even if Boris and Susanna
7 Mirkin have standing, you know, concrete Article 3 standing to
8 pursue a gas claim, the issue is going to come up anyway
9 because the defendant is going to say, well, you know, the gas
10 claim is different from the electric claim. Maybe you can
11 certify one. Maybe you can't certify the other. Maybe it's
12 unmanageable. Maybe you can't try one or try the other.

13 So we're not really saving any time here finding out
14 whether or not, you know, Mr. Mirkin has Article 3 standing,
15 because the issues as to whether or not we can try in a single
16 case a breach of gas contract and a breach of electric
17 contract claim as a class action those are going to re-emerge.

18 So it's our opinion that the most efficient way to
19 deal with this issue is let us have the gas discovery. We'll
20 have the dispute about the scope of the Rule 23 class at the
21 appropriate stage which is at Rule 23.

22 Thank you, Your Honor.

23 MR. ROJAO: Your Honor, may I --

24 THE COURT: Yes.

25 MR. ROJAO: So a couple of points here.

1 The first is the *Jamba Juice* case, I don't have a
2 cite for that. That wasn't cited in plaintiffs' brief so I
3 don't really know how to respond to that at this time. Nor do
4 I think that's properly before the Court on this record.

5 But I will note that in cases that the plaintiff has
6 referenced, those type of consumer goods cases where there is
7 no contract, you might go to a store, there's not even a
8 receipt sometimes, those are very, very different than the
9 cases at issue here where there is a specific contract between
10 an entity, XOOM, and a party in the electricity context,
11 Susanna Mirkin. They actually enrolled, signed and agreed to
12 terms and conditions of a specific contract that governed the
13 parties' relationship.

14 In the *Frito Lay* cases or the *Snapple* cases, there's
15 no specific contract that itemizes what exactly they're going
16 to do.

17 And so while I can appreciate plaintiffs' point with
18 respect to those similar consumer goods in terms of food or
19 Dunkin' Donuts or whatever it is, that's not the case here in
20 these commodities where there are specific contracts, there
21 are specific terms by which XOOM is going to provide those
22 services to the plaintiffs.

23 And for these specific claims where there are
24 contracts, the plaintiffs need to identify someone who is a
25 part of the contract, and identify someone who's paid money to

1 XOOM, identify someone who is damaged and assert claims on
2 behalf of that party. Without that, there is no Article 3
3 standing in this case.

4 THE COURT: This isn't a motion to dismiss for lack
5 of standing.

6 MR. ROJAO: I understand that, Your Honor.

7 THE COURT: This is a motion to compel discovery.
8 And I thought there was a gas contract with Mr.
9 Mirkin.

10 MR. ROJAO: So, again, Mr. Mirkin apparently may
11 have enrolled to receive natural gas services, but as part of
12 this complaint, they haven't alleged that Mr. Mirkin was a
13 natural gas customer, that he paid anything to XOOM, or that
14 he was damaged in any way by XOOM with respect to that natural
15 gas contract. That contract simply came up in terms of
16 reviewing things related to the Mirkins, but there's nothing
17 about that in the complaint.

18 THE COURT: If it's not -- if it's not relevant, why
19 did you produce it?

20 MR. ROJAO: It's relevant to show plaintiffs' prior
21 communications with XOOM and it's relevant to determine
22 whether or not --

23 THE COURT: Prior communications about what, about
24 electric, no, about gas?

25 MR. ROJAO: About signing up for -- how he signed up

1 for services, whether or not that was even him, Your Honor.

2 So we would submit that plaintiffs need to --

3 THE COURT: How he signed up for what services, gas
4 services? How is that relevant to his electric?

5 MR. ROJAO: Well, we don't know if that was him and
6 that's the thing. Again, he signs up --

7 THE COURT: You don't have any records on -- you
8 don't have any records on whether he paid for gas?

9 MR. ROJAO: We have to review that, Your Honor, and
10 that's the thing. Because the records for Susanna --

11 THE COURT: Motion to compel granted with respect to
12 gas only.

13 Now, let's move to the customer complaints.

14 The complaint has gas all over it. I think the
15 plaintiffs did drop the ball in not specifically breaking out
16 their breach of contract claim, gas or electric, or having a
17 separate breach of contract claim for gas, but in the lead up
18 to that section, gas is all over the place. It's fair game.
19 Putting aside whether there's standing, we're not there yet,
20 it's relevant. The discovery request, it is relevant.

21 Federal rules are notice pleading and the I think
22 the defendants had plenty of notice that gas was in play.

23 Why do you need these customer complaints, Mr.
24 Cohen?

25 MR. COHEN: It's more than just the customer

1 complaints. It's we're seeking documents concerning the
2 customer complaints. And what we're mostly concerned about is
3 statements that were made to customers or statements that were
4 made internally in response to complaints that these prices --
5 people were paying these exorbitant prices or, you know,
6 asking what their prices were based on.

7 We know that XOOM has already gathered and produced
8 documents concerning customer complaints in the other Maryland
9 litigation, so they can't complain that this is burdensome to
10 them.

11 In their letter they focus on complaints about
12 business practices and they say business practices over and
13 over again, but as they know what we're really focused on is
14 complaints concerning XOOM's pricing and XOOM's rates. So,
15 you know, all these arguments about business practices is a
16 red herring.

17 Also, XOOM changed it's New York contract language
18 in or around 2016 we know, so we're wondering if that change
19 in contract language had to do with the fact that a customer
20 complained about pricing. And in the process of responding,
21 XOOM was like, oh, whoops, you know, this pricing, this
22 language is not what we're actually doing. We need to change
23 this language going forward.

24 Also, final point, XOOM said that they'd give us
25 documents regarding complaints through the Better Business

1 Bureau and Government agency complaints. They also are
2 collecting from their -- collecting documents using custodian
3 or their compliance person, Patty Kulesa, and training
4 individual regarding folks who handled these customer calls.

5 So we don't understand the differentiation why the
6 Government agency complaints and Better Business Bureau
7 complaints are fair game, but, you know, private complaints
8 submitted through the website or through email or over the
9 phone they don't want to give us. At least the documents
10 concerning them.

11 MR. ROJAO: And I'll respond to that again, Your
12 Honor.

13 THE COURT: Go ahead.

14 MR. ROJAO: So plaintiffs' arguments regarding
15 business practices, that is pulled directly from their
16 requests. So their requests are asking for all complaints
17 related to defendants' business practices. That was how they
18 framed their requests. And the requests themselves are
19 incredibly overbroad and could literally ask about any
20 complaint ever made to XOOM Energy, LLC or XOOM Energy New
21 York regarding anything. So that was their request and that's
22 the language that they used.

23 This is a single claim, breach of contract case,
24 alleging that XOOM breached its electricity sales agreement
25 with plaintiffs by failing to charge them based on XOOM's

1 actual or estimated supply costs as set forth in the
2 agreement.

3 Plaintiffs have already argued in this case and to
4 the Second Circuit that customer complaints and perceptions
5 are irrelevant in order to avoid dismissal of their claims and
6 keep going in this case.

7 What the plaintiffs are trying to do here -- it
8 looks like they're trying to have their cake and eat it too.

9 They want to characterize their claims in one way
10 to avoid dismissal and avoid any consumer expectations
11 argument and then characterize them in a different way to
12 weaponize discovery and obtain all types of customer
13 complaints, irrelevant customer complaints which could include
14 ESI consisting large and costly multimedia audio recordings.
15 They want all of that, Your Honor. None of that's relevant.

16 Plaintiffs have argued already that none of that's
17 relevant because they argued that this is an unambiguous
18 contract term and that customer complaints don't matter to
19 this case. That's how -- that's one of the arguments they
20 made and succeeded on it in avoiding dismissal.

21 So now as part of the discovery process when they're
22 saying we want all these customer complaints, we want the
23 audio recordings of the customer complaints, which could
24 comprise several gigabytes of data because they're audio
25 recordings, they're not just a simple document --

1 THE COURT: How would you even -- how would you even
2 find out which of these audio complaints concern pricing for
3 example?

4 MR. ROJAO: Somebody would have to listen to each
5 one of them. Hopefully it's not me. But somebody would have
6 to listen to them and parse through them to determine what the
7 complaint is about, whether or not it's New York, whether or
8 not it's relevant to anything, Your Honor. None of this is
9 relevant anyway.

10 So this fishing expedition is really not appropriate
11 and we think the motion to compel should be denied pursuant to
12 the plaintiffs' own arguments already in this case, Your
13 Honor.

14 THE COURT: Which is the particular document request
15 that's at issue here?

16 MR. ROJAO: There are several ones, but the key big
17 ones are 25 and 26. They ask in requests 23 through 32, but
18 25 is the really overbroad one -- but all of them really.

19 MR. COHEN: But, Your Honor, this specific dispute
20 was raised because plaintiffs sought production of the
21 customer-complaint related documents already produced in the
22 Maryland litigation. That's how this came to a head.

23 We didn't specifically move on like our RFP-25 and
24 26. What we're seeking here are customer complaints
25 concerning the -- concerning XOOM's pricing and documents

1 related to that.

2 And I didn't hear anything in counsel's response
3 about the documents that I said we were specifically seeking,
4 which is documents concerning defendants' employees responses
5 to the customer complaints, both internal and external, and
6 how, you know, what sort of responses they -- what sort of
7 actions they took including determining whether XOOM was
8 actually following its own complaint language and whether that
9 led to a change in the complaint language -- sorry, not the
10 complaint language -- the contract language.

11 THE COURT: The contract.

12 MR. ROJAO: I'll respond --

13 THE COURT: So --

14 MR. ROJAO: Oops, sorry.

15 THE COURT: Before you do, Mr. Cohen, Mr. Rojao said
16 you argued or the plaintiffs argued to the Circuit that
17 customer complaints were irrelevant. Is that correct?

18 MR. MCINTURFF: I'll take that, Your Honor. I was
19 the one that argued to the Circuit.

20 We argued that a consumer's perception of the
21 meaning of the contract, meaning -- so XOOM's contract says
22 XOOM's going to price its energy based on its actual and
23 estimated supply costs. And we argued to the Second Circuit
24 that what a -- how a consumer interprets that language is
25 irrelevant to the Court's finding of whether or not XOOM --

1 the eventual merits ruling of whether or not XOOM complied
2 with those pricing terms.

3 But what we're seeking here are consumer's response
4 to XOOM's pricing. Consumers don't read the fine print of
5 XOOM's contract. But what they do see is how much money comes
6 out of their pocket. And so what they tend to do when they
7 are getting overcharged is they call and they complain and
8 they say what is going on, why am I being charged this?

9 And what we're looking for is XOOM's response to
10 those complaints, which we believe will inform the contract
11 analysis as to whether or not XOOM was actually charging
12 prices consistent with what it agreed to charge pursuant to
13 the contract.

14 MR. ROJAO: If I may respond, Your Honor?

15 So it seems as though, based on what I'm hearing, is
16 that the plaintiffs are withdrawing their request for the
17 actual customer complaint and want internal XOOM documents.
18 And from that perspective, we believe that the ESI collection,
19 which will include the search terms and the specific ESI
20 related pricing, would pick that information up anyway.

21 And so if they're not requesting the actual customer
22 calling in and saying, hi, whatever the issue is, we think
23 that would be produced as part of the ESI collection and the
24 search terms that we're negotiating now.

25 MR. COHEN: Your Honor, in that regard, we don't

1 know exactly what defendants are going to produce. I mean,
2 the reason why these issues are being raised is because, you
3 know, in the letter -- in letters or discussions down the road
4 they come back and say, oh, no, we're not going to give you
5 natural gas. Oh, no, we're not going to give you customer
6 complaints.

7 So even if our search terms hit on certain of these
8 documents, we don't know if they're going to -- if they're
9 going to decide it's not relevant and we, you know, find that
10 out months down the line.

11 But also with regard to the customer complaints
12 themselves, we would still need them in order to understand
13 the -- you know, in order to understand the full line of
14 communication, even though that's not what we're focused on.

15 But if there's a -- if the call person then talks to
16 the compliance person and they raise some issue, we would
17 certainly want to know what the issue -- what the customer
18 called about or what customers are calling about that prompted
19 that.

20 So even though it's not what we're focused on, we
21 would -- it would still be something we would expect to be
22 produced in the line of documents that we're looking for.

23 MR. MCINTURFF: And if I could just briefly add in
24 terms of the logistics of all of these calls, it's not really
25 that burdensome. Because, you know, our firm has done cases

1 where we've had hundreds of thousands of complaint calls, and
2 when you get a number that looks like that, you don't listen
3 to every single call. You do statistical sampling. And
4 typically you can do a sample of a few hundred calls and
5 you'll get a representative sample of the -- of what's
6 actually going on.

7 So, I mean, none of us have an interest in listening
8 to thousands of complaint calls. We certainly would do a very
9 targeted discovery. And once it gets -- once the number gets
10 above a couple of hundred, you know, you do sampling. So I
11 don't think there's such a concern about having to go down the
12 rabbit hole on this issue.

13 THE COURT: When what number gets above a couple of
14 hundred?

15 MR. MCINTURFF: The number of calls.

16 So if there's -- so, for example, calls are
17 typically organized in a database that have other customer
18 information.

19 If it appears that there is, as we suspect, a
20 substantial number of consumers calling and complaining about
21 their prices, which we can identify through general customer
22 service database notes -- you know, we don't have to listen to
23 the call to know whether or not a customer has called in any
24 complaints -- what you do is you look at the notes for some
25 set of customers. And then once you realize, okay, wow, we've

1 got, you know, hundreds, thousands of potential complaints
2 here, we do a -- we do a statistically significant random
3 sample that is representative of the entire universe.

4 I mean, this is just how -- this is like how polling
5 is done. We'll do a sample. Typically the sample size is
6 anywhere from 50 to a couple of hundred calls. And then based
7 on that sample, we can draw reasonable inferences -- because
8 it's statistically significant and representative -- we can
9 draw the inferences. And we're not talking about, you know,
10 thousands and reviewing thousands and thousands and thousands
11 of call recordings.

12 MR. ROJAO: Your Honor, if I can respond real quick?

13 THE COURT: Go ahead.

14 MR. ROJAO: I'm sorry. I don't mean -- I'll be
15 brief, Your Honor. A few issues with that.

16 First, collecting, storing all of these calls will
17 have hard costs for XOOM, that XOOM will need to incur. So
18 it's not just a matter of picking up a call. XOOM has to
19 collect all of the calls and then store them somewhere on a
20 database with an ESI vendor that's going to charge us for all
21 of these gigabytes and data.

22 And all of that will have hard costs for complaints
23 that, as I mentioned before and plaintiffs seem to allude to,
24 that aren't really relevant here because the contract
25 language, according to plaintiffs, was unambiguous

1 (indiscernible). And so all of that will have hard costs.

2 Second, it seems as though plaintiffs are kind of
3 advising us as to how to do our ESI collection and review and
4 we don't really think that's appropriate. Maybe that worked
5 for the plaintiffs in a different case, but ultimately we're
6 the ones that are going to have to collect this data and
7 review it for customer complaints that are relevant.

8 So plaintiffs overtures in that regard aren't really
9 fair to the defendants who are actually going to be the ones
10 that have to do this. And I think we can all assume that if
11 something is missed during this statistical analysis, the
12 plaintiffs are going to be the first ones to come to the Court
13 and say, hey, where is this, you missed this, what's going on.

14 So it's not as simple as doing a statistical
15 analysis or something like that. There could be other types
16 of issues in those customer complaints that are totally
17 irrelevant to this case that we're not just going to blanket
18 produce to plaintiffs.

19 THE COURT: They're not asking for it to be blanket
20 produced.

21 MR. ROJAO: Yes, Your Honor.

22 THE COURT: They only want the complaints about
23 pricing apparently.

24 Is that right, Mr. Cohen?

25 MR. COHEN: Yeah. That's absolutely right.

1 And, Your Honor, I would just add that we know that
2 there was -- there's been gathering by XOOM and production of
3 customer-complaint related documents in the Maryland case. So
4 to the extent that they're complaining about burden, we don't
5 know exactly what was done. It appears there were complaint-
6 related documents provided for like a six-month period that's
7 relevant here.

8 So, you know, with more information regarding what
9 was done there, you know, maybe, you know, we could determine,
10 you know, whether what was produced there would be fine here,
11 but defendants have just shut down any discovery regarding
12 customer complaints so we don't --

13 THE COURT: How many New York customers are there,
14 gas and electric, during the relevant period?

15 MR. ROJAO: I don't know, Your Honor.

16 Two quick points about --

17 THE COURT: I'm sorry. How could you not know that
18 at this point? You're dealing with a class action for your
19 client where it involves New York gas and electric customers.
20 It's a basic piece of information that they should be able to
21 know at this point.

22 MR. ROJAO: Well, Your Honor, we have certain
23 assumptions, but a lot of that depends on which contracts
24 we're talking about, what period of time we're talking about,
25 natural gas verses electric.

1 So there are certain assumptions, but in order to
2 figure out, you know, we would need to go through and narrow
3 that. And so now with some of the rulings that you made with
4 respect to natural gas, we're going to be able to narrow that.

5 But the other --

6 THE COURT: I'm sorry, Mr. Rojao. I don't know what
7 you just said. It makes no sense to me.

8 It's a basic -- it's a basic piece of information
9 that your client should know from very early on in the case.
10 What are we looking at? What is -- what is the potential
11 class? Whether you disclose it to your adversary or not, they
12 don't do their own internal analysis and say we've got 20,000
13 gas customers in New York from day one to the present
14 potential class?

15 MR. ROJAO: Your Honor, I apologize. We do have
16 assumptions of that information based on what we believe the
17 plaintiffs' proposed class is alleging, meaning the contract
18 language change of February 2016, so we get rid of them. We
19 have certain ideas about that for sure.

20 THE COURT: And so that would be the universe of
21 customer complaints. So customers -- complaints from those
22 people. Are we talking 20,000 customers? Are we talking 500?
23 What are we talking about?

24 MR. ROJAO: More than 20,000, Your Honor, based on
25 preliminary estimates.

1 And without disclosing too much, because there are
2 certain things that we factored into it, I wouldn't want to
3 get to much, but more than 20,000, Your Honor. Meaning I
4 don't want to reveal what we believe their class could be or
5 sate the plaintiffs' appetite for what they think their
6 damages could be because that's not what we think this will
7 be.

8 THE COURT: Where I'm going is --

9 MR. ROJAO: I understand, Your Honor.

10 THE COURT: -- what is the burden? What is the
11 burden? What is the real burden on XOOM to go through these
12 customer complaints, and whether it's a sample or whatever
13 produce, you know, produce them and XOOM's response to the
14 plaintiffs? Because it seems to me that it is relevant.

15 And I don't buy the argument based on what Mr.
16 McInturff said about them arguing that customer complaints are
17 irrelevant. Relevance is particular to -- goes to issues,
18 right? It is relevant to this issue, it is relevant that
19 issue.

20 And, you know, customer complaints may be irrelevant
21 to how a contract is interpreted as a matter of law, but it
22 may be relevant to other issues in the case.

23 And I don't know much about how these customer
24 complaints are tracked, if there's some way of looking at, you
25 know, an account, a customer's account, to see if they raised

1 a complaint on pricing. Easily. And that could identify, you
2 know, the date of the call or something. I just don't enough
3 about how much work it really is for XOOM to do this.

4 MR. WITTELS: Could I just jump in, Your Honor, on
5 this point?

6 Our experience with energy cases -- and we've done
7 many of them -- is that most of the time when people are
8 calling up it's either about billing issues or they're
9 complaining about something.

10 And most of the -- and the reason we've been
11 bringing these suits -- with the PUC having shut down certain
12 type of conduct by the defendants -- is because people are
13 outraged by the costs and they complain.

14 So as my colleagues have explained, this is germane,
15 as Your Honor believes, and at a minimum we should get the
16 documents in the first phase that they've already produced
17 about complaints and they should start looking for the rest of
18 the class.

19 Because I'm hearing from defense counsel, well,
20 we've already cut off from 2016 based on this contract, we
21 don't know what they're trying to cut off because they're not
22 being disclosive and that's part of the problem.

23 Discovery is not a fishing expedition, but it's also
24 supposed to be what we defined, which is people who complained
25 and who were overcharged. And that's why we're not

1 understanding what they're trying to cut off. So it sounds
2 like we might be back if we're not getting cooperation.

3 MR. ROJAO: Well, Your Honor --

4 MR. BROWN: This is Daniel Brown. If I may be heard
5 on that just real quickly?

6 The first thing, with respect to what was produced
7 in the other litigation, it's my understanding that was
8 subject to extensive motion to compel practice. This was not
9 something that was just willingly turned over.

10 Additionally, that other case involves a number of
11 different states, number of different plaintiffs that are not
12 relevant to our current actions, so I don't know as if it's
13 just easy enough as just pressing the go button with respect
14 to what's been previously produced.

15 The second thing I would say is we have been in a
16 process of trying to define, in connection with the ESI
17 discovery, trying to agree on an end date. So I don't want
18 the Court to get this impression that defendants are somehow
19 stonewalling plaintiffs constantly with respect to discovery.
20 We are trying to work together.

21 The reason why we flagged the 2016 date is because
22 the contract changed. We are trying to identify that
23 information and that information identifies how big this class
24 is. It also informs how much discovery, how far we have to
25 go.

1 So I would -- perhaps one thought may be to look for
2 customer complaints with respect to the time period that Mr.
3 Mirkin or the Mirkins I should say were actual customers of
4 XOOM. We could maybe look at that time frame and figure out
5 what we're talking about and what the burden is and we can
6 have an open dialog with the plaintiffs on that.

7 And if we can't come to a resolution, we may, in
8 fact, have to come back to Your Honor, but at least that would
9 be some defined subset for us to get our arms around rather
10 than just everything.

11 THE COURT: When were the Mirkins customers?

12 MR. ROJAO: March 2013.

13 THE COURT: Just one year or not even a full year?

14 MR. ROJAO: Not even a full year. They enrolled in
15 March and were cancelled by November. They didn't actually
16 receive services I think until April or May, but they enrolled
17 in March.

18 MR. MCINTURFF: Your Honor, may I be heard briefly
19 on counsel's proposal?

20 THE COURT: Sure.

21 MR. MCINTURFF: As a threshold matter, since we have
22 the ruling from Your Honor that the complaints are germane, I
23 think it's going to be most efficient if we work cooperatively
24 to try to figure out how to streamline getting the right
25 complaints.

1 As my adversary, but colleague, pointed out, we are
2 having discussions about narrowing the scope of the class
3 based on the discovery that has been obtained thus far. I
4 don't think we need to get into the issue now as to which
5 complaints are germane.

6 For example, because -- for example, if counsel
7 would have made the suggestion on our meet and confer that,
8 you know, limiting complaint discovery to just when the
9 Mirkins were customers, we would have rejected that because
10 first of all the class period goes back six years from the
11 complaint and the class period is going to depend what we
12 think from the plaintiffs' perspective of the class that we're
13 going to be able to certify.

14 I mean, we're not going to -- we're not going to put
15 up a class that is facially uncertifiable -- and that's where
16 this 2016 contract amendment has come in and we're evaluating
17 that issue -- but I don't think we need to at this point, now
18 that Your Honor has ruled that the complaints are germane, get
19 into what exactly should be the cutoffs on either end because
20 that's a discussion that we haven't been able to have because
21 we were blocked on the issue of whether the complaints are
22 germane.

23 So I'm fairly confident that we will be able to
24 outline the parameters of a complaint production. And then if
25 we have any issues, we can come back to Your Honor at some

1 point in the future. I mean, this is a complex case. There's
2 a lot of ESI. There's a lot of work to be done. But I don't
3 -- I don't think that this issue is -- the issue of what
4 complaints to produce is necessarily ripe at this point.

5 THE COURT: Well, in light of the fact that I don't
6 have enough information to make any sort of definitive ruling
7 on what should be produced, for what period, how burdensome it
8 is, I think that's a good suggestion.

9 Customer complaints are relevant. You need to
10 continue to meet and confer on that for the period of time.

11 And specifically what is it that will be produced?
12 Is it the audio? Is it the customer notes? Is it something
13 else? I don't know. You need to work -- figure that out.
14 And if you can't agree to it, then bring it back to me.

15 MR. MCINTURFF: Thank you, Your Honor.

16 MR. ROJAO: Thank you, Your Honor.

17 THE COURT: Mr. Wittels, you want to talk about the
18 motion interim class counsel?

19 MR. WITTELS: Yes, Your Honor. Thank you.

20 The reason we're still pressing Rule 23(g)(3) and to
21 be appointed interim class counsel is because, now even more
22 perhaps than the situation we were in before, the Court in
23 Maryland denied class certification.

24 We face the situation where the defendants here will
25 not acknowledge either in writing, orally or otherwise that

1 they won't try to do a reverse auction. Which means that with
2 a weakened plaintiffs' counsel, the *Todd* counsel, they are now
3 prime to perhaps file a notice of appeal and cut a sweetheart
4 deal that tries to encompass our New York plaintiffs and our
5 New York customers. So we need the Court's protection as a
6 fiduciary to appoint us to make sure that that doesn't happen.

7 The defendants say in their letter of two days ago,
8 August 25th, that a reverse auction is not a plausible
9 concern.

10 Actually as I've just stated, it's more plausible
11 because this is the time when you go to a plaintiff who might
12 be willing to take less. And we know they were having
13 settlement discussions before this motion was decided in
14 Maryland because they said -- when we were in front of you,
15 they acknowledged, well, we'll keep you involved in any
16 discussions. Well, if there were any, we were never party to
17 it.

18 We're having obviously a communication gap with
19 defendants which is why we're here on a discovery motion. We
20 can't get them to acknowledge that they won't cut a deal
21 elsewhere that would then leave us what? The options that
22 they suggested? They cite a case which says there's a
23 plethora of options. None of the options are good and there's
24 certainly not a plethora.

25 What they're saying with that is let us go settle

1 out your claims in New York because that complaint was a broad
2 complaint. Let us go settle out our complaint and then you
3 can object -- which is a terrible position to be in to have a
4 plaintiff trying to object to a class settlement -- or you can
5 try to intervene -- which is also not where we want to be
6 because we have our own claims for breach of contract that are
7 not in that case.

8 So we should be appointed interim class counsel to
9 protect exactly against the situation that the courts in all
10 of the cases we cited in our three letters -- we moved for
11 interim class counsel. We put a reply in. And we most
12 recently advised you of the *Todd* decision where we again cited
13 the need for it.

14 So we think that unless defendants are willing to
15 stipulate that they're not going to settle the New York claims
16 in any fashion in the *Todd* action then we should be appointed
17 counsel. They're not opposing us in terms of our adequacy,
18 our competence to do this. They just say there's no worry.
19 We think there is a worry.

20 And I can tell you one final point. That in the
21 *Todd* -- we've had a -- we know that the *Todd* plaintiffs have
22 engaged -- *Todd* plaintiffs' counsel -- sorry, Your Honor --
23 have engaged in the past in that type of reverse auction
24 scenario and that's exactly another concern we have because we
25 know it's happened from that counsel.

1 And we don't want to be in the situation of coming
2 to the Court, in that court trying to object there to an
3 appointment, or to come back and tell Your Honor, you see,
4 this could have been prevented had we been appointed.

5 One final point -- I'm sorry for saying my last was
6 the final point -- which is that Judge Levy in this court was
7 faced with a similar situation and appointed us in a large
8 consumer class action where an other action had been filed in
9 New Jersey -- we had brought the case in New York -- and he
10 after thinking about it did appoint us, felt we were adequate
11 class counsel. That was the *Ocwen* matter.

12 And courts do not only appoint interim class counsel
13 where there are multiple class actions. That was a case where
14 there was only one other filed and ours. And that's what we
15 have here.

16 So for those reasons, we think you should grant it.
17 It's not a permanent status. It carries none of the indicia
18 which defendant worried about that suddenly you're giving your
19 imprimatur to the class, that it has merit, it simply for us
20 to be in control of the case and to protect the class
21 interests as a fiduciary.

22 MR. BROWN: Yes, Your Honor. This is Daniel Brown.
23 I will be addressing this motion.

24 I heard Mr. Wittels and I believe that there's just
25 a lot of what ifs, a lot of what ifs, you know, we may do

1 this, we may do that.

2 I could tell you there has not been any settlement
3 discussions. We've confirmed -- we've told you when we were
4 before you in February that we would keep them in the loop
5 with respect to settlement discussions. There have been none
6 with respect to the *Todd* litigation.

7 Now that the *Todd* court granted, sorry, denied class
8 certification, I think the concerns they have, this reverse
9 auction, has evaporated.

10 We are interested -- I don't know how to say this --
11 everyone on this call knows that after class cert's denied,
12 the class action is essentially over absent an appeal.

13 At this point, XOOM has prevailed in *Todd*. We're
14 not going to try to do anything to undo that.

15 So the fear that we're going to reverse auction them
16 is really just that, it's a fear.

17 And I understand from Mr. Wittels that there have
18 been -- had this issue come up with this same firm in the
19 past, but there's a whole lot of ifs before we get to that
20 point.

21 The other thing is, and it's cited in our papers,
22 it's Judge Santos, sorry, not Judge Santos, it's the Santos
23 opinion out of the District of New Jersey where the
24 plaintiffs' counsel there tried for a second time to be
25 designated as interim class counsel and the District of New

1 Jersey denied that again saying that you have other options.

2 If there is a class -- if a competing class action
3 attempts to settle you out, attempts to take you out of the
4 game, you've got other chances. You can intervene in that
5 case. You can object to that. You can move to stay. There's
6 all sorts of other things that can be done.

7 And there's no need to have interim class counsel
8 appointed at this point when there is just a sort of ephemeral
9 threat that there will be somehow that there's a reverse
10 auction.

11 Additionally, the two cases are different. I mean,
12 we noted in our paper back in -- I don't remember whether it
13 was January or February, that, you know, the way that class
14 was defined with respect to the *Todd* litigation it could
15 impact this one. That's all we were flagging. We didn't say
16 we were going to. We didn't say we were trying to. We said
17 it could happen. We'll bring it to everyone's attention.

18 Now that that case has been -- class certification's
19 been denied, that class definition is out the window.

20 And on top of that, plaintiffs have gone out of
21 their way to show how their case is different and to show that
22 their case doesn't -- their case is all about contract under
23 New York law. There's no contract claims in *Todd* so how are
24 we going to reverse auction them out?

25 I just -- I think there's a lot of distrust, there's

1 a lot of fear. And I understand that that's happened to
2 plaintiffs in the past, so I can understand where they're
3 coming from, but I think it's misplaced here.

4 The second point I would note is that the vast
5 majority of the cases where interim class counsel is appointed
6 is when you've got multiple, competing class actions filed. I
7 mean, you think about stock drop suits where there's 5 to 7 to
8 18 cases filed and you have to somehow coordinate those, cases
9 are consolidated, and there's interim class counsel because
10 you have to have one voice. That's not the situation we're
11 dealing with here. We have a single plaintiff, I'm sorry, a
12 single class action.

13 I think this case is more akin to the *Donaldson* case
14 out in the Central District of California that we cite in our
15 papers where the Court decided there's no special
16 circumstances at this point that are going to -- that caused
17 that court to appoint an interim class counsel before the
18 class certification stage. And I think our case is a lot
19 similar in that, that there is no reason to do this at this
20 point.

21 With respect to our argument, XOOM's argument, that
22 this appointment at this point is now premature and
23 unnecessary, the plaintiffs, in their reply brief, they cite
24 to the *Scott vs. J.P. Morgan* case out of the Southern District
25 with Judge -- I'm going to say Judge Gardephe, G-A-R-D-E-P-H-

1 E. And in that case --

2 THE COURT: Gardephe.

3 MR. BROWN: How is it pronounced? I'm sorry.

4 THE COURT: Gardephe.

5 MR. BROWN: Gardephe?

6 THE COURT: Right. From the Southern District?

7 MR. BROWN: That's correct. Yes.

8 THE COURT: Wait. Is he from Southern or Northern?
9 He's Southern. Paul Gardephe.

10 MR. BROWN: Yes. I have the -- that's correct.
11 Yes. I've got it right here. Gardephe. Thank you, Your
12 Honor.

13 He did determine to appoint interim class counsel,
14 notwithstanding defendants' objections that it was premature
15 and unnecessary under the situation, but he also noted in
16 making that appointment that it appears likely that a -- I'm
17 quoting from the order, "It appears likely that a number of
18 motions will be filed early in this case, including a motion
19 to compel arbitration, a motion to dismiss, and a motion for
20 class certification." Those aren't the situations that we're
21 in. There's no motion to compel arbitration.

22 And I think it's interesting that if you dig a
23 little deeper into that *Scott vs. J.P. Morgan* case, it was
24 transferred to Judge Failla from the Southern District and
25 Judge Failla ultimately granted the motion to compel

1 arbitration because arbitration was required under that
2 individual's depository account agreement with the bank.

3 So after that, the named plaintiff had to compel,
4 sorry, had to arbitrate their case and that case was
5 ultimately dismissed on the insistence of the plaintiffs.

6 So I say that just as a cautionary tale because I
7 don't want -- we don't know what the future's going to hold in
8 this litigation. I don't see any reason why we need to enter
9 an order appointing interim counsel when things can change in
10 the future. And I think that that *Scott vs. J.P. Morgan* case
11 is a prime example of that.

12 One last point. I think if you -- if you look at
13 the cases where there is either a single case or there's only
14 two cases where the interim class counsel have been appointed,
15 there are, as the *Donaldson* Court noted, there are some
16 special circumstances.

17 And the one case, in the *Friedman vs. Guthy-Renker*
18 case, there, the first class action was filed a year or so
19 before the second class action. The first class action had
20 undergone significant proceedings, including four mediation
21 sessions, as well as a tentative settlement agreement before a
22 second class action was filed in New York, the first one being
23 in California.

24 At that point, there is an -- the Court determined
25 to appoint interim class counsel because the first case was so

1 far along. Again, that's not the situation we're in. The
2 facts are drastically different, such that we see no reason
3 why we need to have anyone appointed as interim class counsel
4 at this point.

5 And with that, I'll -- if you have any questions,
6 Your Honor.

7 THE COURT: What is the harm to XOOM were
8 plaintiffs' counsel to be appointed as interim class counsel?
9 If any?

10 MR. BROWN: Well, I think the harm is -- as we
11 pointed out in our opposition letter -- is that it does give
12 plaintiffs an imprimatur. That there's a stamp on this that
13 this case is meritorious and I think it gives them a leg up on
14 their class certification. They can say, look, we've already
15 interim class counsel. We've represented the class. We've
16 done X, Y and Z as interim class counsel.

17 So there's really not that much of a step, you know,
18 it's maybe a half step, not a whole step, maybe not three
19 steps, it just a little bit for class certification. I think
20 that's our fear and that's the concern.

21 And I think part of that has been played out in
22 plaintiffs' letter from August 20th wherein they do describe
23 the *Todd* case and why they think it supports them. But they
24 also go into why cases like this should be certified.

25 So we're already starting on class certification

1 arguments before any motions have been filed. So that's our
2 concern and that's the harm to XOOM.

3 THE COURT: Mr. Wittels, you want to respond?

4 MR. WITTELS: Yes. Thank you, Your Honor.

5 First, as Your Honor pointed out, there is no harm.
6 And defense counsel just articulated none. Because there's
7 not, in any case we identified, a court stating that giving
8 interim class counsel status somehow gives plaintiffs a leg up
9 in the class certification arena.

10 In fact, the standards we pointed out in our letter
11 of July 31, document 68, don't involve that at all. And the
12 Judicial Center, and the appointment under Rule 23(g), and the
13 manual recommend early appointment prior to class
14 certification to protect absent class members' interests.

15 And the standards don't involve our fear here, which
16 is just an enhancement as to the earlier -- as to the fact
17 that there could be a reverse auction, that is a compelling
18 reason.

19 But we've met the legal standards which are
20 essentially the four standards, the work we've done in
21 investigating, and these potential claims having to take this
22 case all the way up to the Second Circuit, get it reversed and
23 be where we are now, actively pursuing and pushing for the
24 discovery.

25 Our experience in handling class actions, which

1 they're not questioning, particularly that we've done and
2 settled three major energy class actions.

3 Our knowledge of this type of law, we're well versed
4 in that. There's no doubt about it.

5 And the resources that we've committed to this.
6 We've expended and are willing to expend with the ESI
7 discovery what's necessary to protect this class.

8 So I think we've met overall the criteria under
9 23(g).

10 And as Your Honor pointed out, there is no harm to
11 appointing this. The judge is not going to view the fact that
12 we are interim class counsel as a leg up. I've never seen
13 such a term in any of the cases. So there is no harm.

14 But there is a potential for harm that the
15 defendants still won't acknowledge, even on this phone call,
16 that they're not going to try a reverse auction. And who
17 knows what the plaintiffs will try there in the *Todd* case now
18 that they're weakened. So there is a plausible concern,
19 unlike defendants -- which defendants seem to deny by bringing
20 that up in their letter.

21 THE COURT: Is there any -- he's back -- Mr. Brown,
22 is there -- XOOM is not contending that Mr. Wittels and his
23 colleagues are not -- haven't satisfied the Rule 23(g)
24 standard for appointment of counsel, is it?

25 MR. BROWN: We have not put a statement of position

1 out in our letters before Your Honor that they are somehow
2 unfit to serve as class counsel, no.

3 And typically I don't think defendants do wade into
4 that fight with respect to interim class counsel motions,
5 especially where you've got multiple, different plaintiffs
6 competing with each other.

7 So to answer your question, no, we're not and we
8 have not in our letters. So that's --

9 THE COURT: So I think now is not the time. There
10 is no threat. There is no need. And this should not be seen
11 as something that bootstraps, if you will, a motion for class
12 certification?

13 MR. BROWN: (Indiscernible), Your Honor.

14 THE COURT: I don't know if bootstraps is the right
15 term.

16 MR. BROWN: I had thought bootstrap was -- that was
17 the same term that popped -- jumped into my head, Your Honor.

18 No. Sorry. No. What you just laid out is exactly
19 our position and our concerns, that now is not the time and it
20 is not necessary in a situation where you have a single class
21 action. It makes a lot of sense where you've got multiple,
22 competing class actions.

23 THE COURT: All right. I'm going to reserve
24 decision on that and I will write a -- whichever way I come
25 out, I will write a short summary order.

1 MR. BROWN: Thank you, Your Honor.

2 MR. MCINTURFF: Could I be heard on one discrete
3 point that counsel made, Your Honor?

4 THE COURT: Sure.

5 MR. MCINTURFF: On the bootstrap point, I just
6 looked back at our briefing in our -- in the class action that
7 Judge Levy appointed us as interim class counsel when we moved
8 for class certification. That was a case assigned to Judge
9 Garaufis. It was -- it involved 55,000 class members.

10 We ended up settling the case on the eve of class
11 certification decision. I think we settled it for \$39
12 million. We had an excellent, excellent distribution to
13 class.

14 I just looked through that briefing, which was
15 incredibly complex and very long, and the only time the word
16 interim appeared in our signature block. So we didn't use the
17 fact that we had been appointed interim class counsel in any
18 way to bootstrap, you know, to say that somehow the Court
19 should do less of an analysis on the Rule 23 at the Rule 23
20 stage. And the main reason we didn't do that is because it's
21 totally irrelevant. I mean, the 23(g) factors aren't the same
22 as the regular Rule 23 factors.

23 So there shouldn't be a concern about the
24 bootstrapping. They can look at our briefing. We're
25 certainly not going to deviate from our normal practices in

1 briefing if interim class counsel's granted.

2 MR. WITTELS: And I will say briefly, if Your Honor
3 will just indulge me for one more minute, that it is --
4 defendants may not think it's a plausible concern, but it is a
5 real concern to us that there is a separate class action still
6 out there and the potential for a reverse auction that they
7 won't acknowledge, even on the record here today, yes, we
8 won't settle it.

9 They said in their -- when we were down before Your
10 Honor earlier in the year -- we're bringing to your attention
11 the possibility of some overlap. That's still a potential
12 because the claims were pled broadly in the Maryland case. So
13 we do have a concern.

14 And we know that the *Todd* plaintiffs have engaged in
15 that behavior before. We know there was some settlement
16 discussions at some point with them. If there's no fear by
17 the defendants that we should be worried about, then let them
18 stipulate on the record that we're proper and adequate counsel
19 which they acknowledge here today and we move forward.

20 THE COURT: Last word, Mr. Brown.

21 MR. BROWN: Thank you, Your Honor.

22 I was just going to note I don't believe that *Ocwen*
23 materials were cited in any of the letters before Your Honor
24 so I have not had an opportunity to look at that case or to
25 look at the briefing in that case. I would be interested to

1 know if that was one where there were multiple cases filed
2 such that interim class counsel did make sense under that
3 circumstance.

4 I just don't -- they may not have done it in that
5 case and that may be their normal practice. I don't know.
6 But my point is there's the -- specter's the wrong word to use
7 -- there's the veneer, there's the gloss that this is -- that
8 it should be more than it is. That's really our position with
9 respect to the bootstrapping. Perhaps bootstrapping is too
10 strong a word, but that's the concern there.

11 THE COURT: Okay. All right. I will take it under
12 advisement and you'll know shortly.

13 MR. BROWN: Thank you, Your Honor.

14 MR. WITTELS: Your Honor, the only point is while we
15 may not have mentioned it, I thought we did, but if we didn't,
16 there was only one class action that was filed after ours in
17 New Jersey in federal court after we had already been
18 litigating it here in New York. So it wasn't multiple class
19 actions. It was the same scenario. And Judge Levy felt that
20 the time had come where we should be appointed and it was to
21 protect the class's interested, which we did.

22 THE COURT: The rule itself doesn't require multiple
23 class --

24 MR. WITTELS: No.

25 THE COURT: -- actions or even a second class action

1 to be filed before --

2 MR. WITTELS: Right.

3 THE COURT: -- interim class counsel can be
4 appointed, right?

5 MR. WITTELS: Correct.

6 THE COURT: All right. I'll take it under
7 advisement, gentlemen.

8 MR. WITTELS: Thank you.

9 THE COURT: (Indiscernible) 12:30 I have to go.
10 Hopefully they're still waiting.

11 ALL COUNSEL: Thank you, Your Honor.

12 (Proceedings concluded at 12:42 p.m.)

13 I, CHRISTINE FIORE, court-approved transcriber and
14 certified electronic reporter and transcriber, certify that
15 the foregoing is a correct transcript from the official
16 electronic sound recording of the proceedings in the above-
17 entitled matter.

18
19
20 Christine Fiore

September

21 17, 2020

22 Christine Fiore, CERT
23